representing non-contingent trust interests which are insured pursuant to paragraph (a) of this section.

(c) *Definitions of trust interest* and *non-contingent trust interest*. For the purposes of this section:

(1) The term *trust interest* means the interest of a beneficiary in an irrevocable express trust (other than an employee benefit plan) created either by written trust instrument or by statute, but does not include any interest retained by the settlor.

(2) The term *non-contingent trust interest* means a trust interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in §20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables which may be adopted by the Internal Revenue Service.

(d) *Commingled accounts of bankruptcy trustees*. Whenever a bankruptcy trustee appointed under Title 11 of the *United States Code* commingles the funds of various bankruptcy estates in the same account at an insured depository institution, the funds of each Title 11 bankruptcy estate will be added together and insured for up to $100,000, separately from the funds of any other such estate.

[55 FR 20122, May 15, 1990, as amended at 60 FR 7710, Feb. 9, 1995]

§330.12 Retirement and other employee benefit plan accounts.

(a) *''Pass-through'' insurance*. Except as provided in paragraph (b) of this section, any deposits of an employee benefit plan or of any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457) in an insured depository institution shall be insured on a ''pass-through'' basis, in the amount of up to $100,000 for the non-contingent interest of each plan participant, provided that the FDIC's recordkeeping requirements, as outlined in §330.4, are satisfied.

(b) *Exception*. ''Pass-through'' insurance shall not be provided pursuant to paragraph (a) of this section with respect to any deposit accepted by an insured depository institution which, at the time the deposit is accepted, may not accept brokered deposits pursuant to section 29 of the Act unless, at the time the deposit is accepted:

(1) The institution meets each applicable capital standard; and

(2) The depositor receives a written statement from the institution indicating that such deposits are eligible for insurance coverage on a ''pass-through'' basis.

(c) *Aggregation—(1) Multiple plans*. Funds representing the non-contingent interests of a beneficiary in an employee benefit plan, or eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986, which are deposited in one or more deposit accounts shall be aggregated with any other deposited funds representing such interests of the same beneficiary in other employee benefit plans, or eligible deferred compensation plans described in section 457 of the Internal Revenue Code of 1986, established by the same employer or employee organization.

(2) *Certain retirement accounts*. (i) Deposits in an insured depository institution made in connection with the following types of retirement plans shall be aggregated and insured in the amount of up to $100,000 per participant:

(A) Any individual retirement account described in section 408(a) of the Internal Revenue Code of 1986 (26 U.S.C. 408(a));

(B) Any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986; and

(C) Any individual account plan defined in section 3(34) of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. 1002) and any plan described in section 401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d)), to the extent that participants and beneficiaries under such plans have the right to direct the investment of assets held in individual accounts maintained on their behalf by the plans.

(ii) The provisions of this paragraph (c) shall not apply with respect to the deposits of any employee benefit plan, or eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986, which is not entitled to ''pass-through'' insurance pursuant to paragraph (b) of this section. Such deposits shall be aggregated and

insured in the amount of $100,000 per-plan.

(d) *Determination of interests*—(1) *Definded contribution plans.* The value of an employee's non-contingent interest in a defined contribution plan shall be deemed to be the employee's account balance as of the date of default of the insured depository institution, regardless of whether said amount was derived, in whole or in part, from contributions of the employee and/or the employer to the account.

(2) *Defined benefit plans.* The value of an employee's non-contingent interest in a defined benefit plan shall be deemed to be the present value of the employee's interest in the plan, evaluated in accordance with the method of calculation ordinarily used under such plan, as of the date of default of the insured depository institution.

(3) *Amounts taken into account.* For the purposes of applying the rule under paragraph (c)(2) of this section, only the present vested and ascertainable interests of each participant in an employee benefit plan or ''457 Plan,'' excluding any remainder interest created by, or as a result of, the plan, shall be taken into account in determining the amount of deposit insurance accorded to the deposits of the plan.

(e) *Treatment of contingent interests.* In the event that employee' interests in an employees benefit plan are not capable of evaluation in accordance with the rules contained in this section, or an account established for any such plan includes amounts for future participants in the plan, payment by the FDIC with respect to all such interests shall not exceed $100,000 in the aggregate.

(f) *Overfunded pension plan deposits.* Any portion(s) of an employee benefit plan's deposits which are not attributable to the interests of the beneficiaries under the plan shall be deemed attributable to the overfunded portion of the plan's assets and shall be aggregated and insured up to $100,000, separately from any other deposits.

(g) *Definitions of ''depositor'', ''employee benefit plan'', ''employee organizations'' and ''non-contingent interest''.* Except as otherwise indicated in this section, for purposes of this section:

(1) The term *depositor* means the person(s) administering or managing an employee benefit plan.

(2) The term *employee benefit plan* has the same meaning given to such term in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1002) and includes any plan described in section 401(d) of the Internal Revenue Code of 1986.

(3) The term *employee organization* means any labor union, organization, employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose, in whole or in part, of establishing such a plan.

(4) The term *non-contingent interest* means an interest capable of determination without evaluation of contingencies except for those covered by the present worth tables and rules of calculation for their use set forth in § 20.2031–7 of the Federal Estate Tax Regulations (26 CFR 20.2031–7) or any similar present worth or life expectancy tables as may be published by the Internal Revenue Service.

(h) *Disclosure of capital status*—(1) *Disclosure upon request.* An insured depository institution shall, upon request, provide a clear and conspicuous written notice to any depositor of employee benefit plan funds of the institution's leverage ratio, Tier 1 risk-based capital ratio, total risk-based capital ratio and prompt corrective action (PCA) capital category, as defined in the regulations of the institution's primary federal regulator, and whether, in the depository institution's judgment, employee benefit plan deposits made with the institution, at the time the information is requested, would be eligible for ''pass-through'' insurance coverage under paragraphs (a) and (b) of this section. Such notice shall be provided within five business days after receipt of the request for disclosure.

(2) *Disclosure upon opening of an account.* (i) An insured depository institution shall, upon the opening of any account comprised of employee benefit

plan funds, provide a clear and conspicuous written notice to the depositor consisting of: an accurate explanation of the requirements for pass-through deposit insurance coverage provided in paragraphs (a) and (b) of this section; the institution's PCA capital category; and a determination of whether or not, in the depository institution's judgment, the funds being deposited are eligible for ''pass-through'' insurance coverage.

(ii) An insured depository institution shall provide the notice required in paragraph (h)(2)(i) of this section to depositors who have employee benefit plan deposits with the insured depository institution on July 1, 1995 that, at the time such deposits were placed with the insured depository institution, were not eligible for pass-through insurance coverage under paragraphs (a) and (b) of this section. The notice shall be provided to the applicable depositors within ten business days after July 1, 1995.

(3) *Disclosure when ''pass-through'' coverage is no longer available.* Whenever new, rolled-over or renewed employee benefit plan deposits placed with an insured depository institution would no longer be eligible for ''pass-through'' insurance coverage, the institution shall provide a clear and conspicuous written notice to all existing depositors of employee benefit plan funds of its new PCA capital category, if applicable, and that new, rolled-over or renewed deposits of employee benefit plan funds made after the applicable date shall not be eligible for ''pass-through'' insurance coverage under paragraphs (a) and (b) of this section. Such written notice shall be provided within 10 business days after the institution receives notice or is deemed to have notice that it is no longer permitted to accept brokered deposits under section 29 of the Act and the institution no longer meets the requirements in paragraph (b) of this section.

(4) *Definition of ''employee benefit plan''.* For purposes of this paragraph, the term *employee benefit plan* has the same meaning as provided under paragraph (g)(2) of this section but also includes any eligible deferred compensation plans described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457).

[58 FR 29964, May 25, 1993; 58 FR 40688, July 29, 1993; 60 FR 7710, Feb. 9, 1995]

§ 330.13 Bank investment contracts.

(a) *General rule.* Any liability arising under any insured depository institution investment contract between any insured depository institution and any employee benefit plan which expressly permits benefit-responsive withdrawals or transfers shall not be treated as an ''insured deposit'' and thus shall not be entitled to deposit insurance.

(b) *Definitions.* For purposes of paragraph (a) of this section:

(1) *Benefit-responsive withdrawals or transfers* means any withdrawal or transfer of funds (consisting of any portion of the principal and any interest credited at a rate guaranteed by the insured depository institution investment contract) during the period in which any guaranteed rate is in effect, without substantial penalty or adjustment, to pay benefits provided by the employee benefit plan or to permit a plan participant or beneficiary to redirect the investment of his or her account balance. This term excludes penalty-free withdrawals from employee benefit plan deposits which are based on penalty-free withdrawals of funds from an employee benefit plan that are permitted or required pursuant to the Employee Retirement Income Security Act of 1974 or the Internal Revenue Code.

(2) *Employee benefit plan:* (i) Has the meaning given to such term in section 3(3) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. 1002); and

(ii) Includes any plan described in section 401(d) of the Internal Revenue Code of 1986 (26 U.S.C. 401(d)); and

(iii) Excludes any deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457).

(3) *Substantial penalty or adjustment* means, in the case of a deposit having an original term which exceeds one year, all interest earned on the amount withdrawn from the date of deposit or for six months, whichever is less; or, in the case of a deposit having an original term of one year or less, all interest